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COMMENTS

POWER OF LEGISLATIVE BODIES TO PUNISH FOR CONTEMPT.

Does a legislative body in the United States have the power to punish for contempt both its own members and outsiders as a means of carrying out its legitimate legislative functions: (1) of keeping order among its own members and compelling their attendance and of protecting them from the assaults or disturbances of others who (a) physically obstruct its proceedings, or (b) slander or libel the assembly or its members; (2) of discharging such judicial-like functions as the determination of election cases and impeachment charges; (3) of seeking information deemed necessary for the enactment of laws or the voting of supplies; and (4) of educating the voters or bringing to bear upon administration the force of enlightened public opinion?

Under the English legislative practice, sustained by the courts of Westminster Hall, the House of Commons, by its contempt powers, has protected its members—and at one time their servants and tenants—from arrest on civil process during the sessions of Parliament and for a reasonable time before and after the session, and from assaults, affronts, insults, and libels, and has protected itself against publications reflecting upon its dignity, and since 1689 has controlled elections and investigated other departments of government and matters of general concern.¹

In *Kilbourn v. Thompson*,² the United States Supreme Court took the position that the English legislative practice was not a precedent for the United States because the contempt power of the House of Commons is not an inherent legislative power but a judicial power derived from the days when it sat with the other house as one body as the High Court of Parliament. This position was clearly wrong because either the House of Commons is not a law court,³ or if it is a law court it is such a court to no greater extent than United States legislative bodies. It is essentially a legislative body, and its practice has persuasive value

¹ *Barnardiston v. Soame* (1689), 6 State Trials 1119, 74 U. of Pa. L. Rev. 700-708.

² (1880) 103 U. S. 168.

³ *Jones v. Randall* (1774) 1 Cowp. 17.

in this country. The powers of the House of Commons in this respect are only a part of our Anglo-American heritage.

In America, the colonial assemblies followed the example of the mother country, and punished as for contempt people who detained, or assaulted, or affronted members or members-elect, or libelled the assemblies themselves, and exercised the contempt powers in the control of elections, and in connection with the investigations of other departments of government.⁴

Nine of the eleven states which adopted constitutions during the Revolution made no mention of the power of punishment for contempt, but the statesmen of the Period were familiar with colonial precedents and regarded the power to punish for contempt as an auxiliary of the legislative power and therefore not necessary to be mentioned, and the state legislatures in Virginia, Pennsylvania, and New York acted upon this theory in a number of instances.⁵

The Constitution of the United States is silent upon the subject of punishment for contempt except as it gives each house power to "punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member," but Congress has in numerous instances acted upon the theory that it has such an auxilliary power. In 1795 the House punished for contempt Robert Randall for offering a bribe. In 1800 the Senate punished for contempt William Duane for refusal to appear to answer a libel charge. In 1812 the House punished for contempt N. Rounsavell for refusal to testify. In 1818 the House punished for contempt John Anderson for bribery. In 1809 the House punished for contempt J. A. Coles for an assault on a member. In 1828 the House punished for contempt one Jarvis for an assault on the President's private secretary sent as a messenger. In 1832 the House punished for contempt Sam. Houston, a former governor of Tennessee, for an assault. In 1792 the House investigated the St. Clair Expedition. In 1859 the Senate investigated the Raid of John Brown and punished T. Hyatt for contempt for refusal to attend.⁶ A great variety of other investigations have been ordered by one or the other house.⁷

There have been many decisions of the state courts recognizing the legislative practice so far as concerns the legislature's

⁴ 74 U. of Pa. L. Rev. 701-703, 704-706, 707-708, 708-712.

⁵ 74 U. of Pa. L. Rev. 712-719.

⁶ 74 U. of Pa. L. Rev. 719-725; *McGrain v. Daugherty*, 47 S. Ct. 319.

⁷ 38 Harv. L. Rev. 234, 237, n. 28. See also: 1 Stat. 554, c. 36; 11 Stat. 155, c. 19; 3 Stat. 345, c. 10; 12 Stat. 333.

protective or defensive function,⁸ the legislature's judicial function,⁹ and the legislature's law-making function.¹⁰

Prior to 1927 there were four decisions of the United States Supreme Court upon the question of the contempt powers of Congress.

The first decision was that of *Anderson v. Dunn*.¹¹ In this case Dunn, sergeant at arms, brought Anderson before the House and kept him in attendance until he was heard in his defense and was finally reprimanded for attempting to bribe a member. He acted pursuant to a warrant of the speaker of the House under authority of a resolution of the House. Anderson later sued Dunn in trespass for assault and battery and imprisonment. The Supreme Court held that Dunn was not guilty because protected by the authority of the House, and said that the power to punish for contempt was a legislative as well as a judicial power, but not an executive power.

The next decision was that of *Kilbourn v. Thompson*.¹² In this case the sergeant-at-arms of the House was held liable for the imprisonment of the plaintiff for refusal to testify before the House, although he acted under an order of the House, on the ground that the House had exceeded its powers in directing the investigation, but the investigation related to the private affairs of a real estate partnership where the United States was a mere creditor of one of the parties concerned and the investigation was clearly judicial in nature. However, the court held that punishment for contempt was a judicial power, and that the House could punish for contempt (1) only its own members when guilty of disorderly conduct or failure to attend, and its own members or others in (2) contested elections, and (3) impeachment cases.

The next case was *In re Chapman*.¹³ Chapman on subpoena appeared before a committee, and was asked whether or not his firm of stockbrokers had bought or sold stock or securities

⁸ *Ex parte McCarthy* (1866), 29 Cal. 395, 403; *Canfield v. Gresham* (1891), 82 Tex. 10; *Sullivan v. Hill* (1913), 73 W. Va. 49; *In re Falvey* (1858), 7 Wis. 630, 636. The leading English case upholding the power of the House of Commons to imprison for the publication of a libel upon it is *Burdett v. Abbott* (1811), 14 East 1, 137-8.

⁹ *Ex parte Dalton* (1886), 44 Oh. 142, and cases supra note 8.

¹⁰ *Burnham v. Morrissey* (1859), 14 Gray 226, 238; *McDonald v. Keeler* (1885), 99 N. Y. 463; *Ex parte Parker* (1906), 74 S. C. 466; *State v. Frear* (1909), 138 Wis. 173.

¹¹ (1821) 6 Wheat. 204.

¹² (1880) 103 U. S. 168.

¹³ (1896) 166 U. S. 661.

in the American Sugar Refining Co. for United States senators, but he refused to answer. He was then indicted and convicted under an act of 1857 making contempt a misdemeanor and was imprisoned. He then sued out a writ of habeas corpus. The Supreme Court held that the Senate could compel witnesses to appear and testify in connection with its protective and defensive function and that it could make the contempt a misdemeanor.

The latest case was *Marshall v. Gordon*.¹⁴ In this case a United States attorney for the Southern District of New York, while a committee of the House was investigating him with a view to impeachment, published a letter which the House called defamatory and for which he was arrested. He sued out a writ of habeas corpus and the Supreme Court held that it would lie on the ground that the House had the power to punish for contempt only to preserve a legislative power granted and then could imprison only during the session, and apparently that it did not have the power to punish as for contempt, slander or libel of the House or its members.

Thus the Supreme Court prior to 1927 had upheld the contempt powers of Congress so far as they related to keeping order among its own members, compelling their attendance, and protecting them from the assaults or disturbances of others by physical means, although apparently not if by slander or libel, and so far as they related to the discharge of such judicial-like functions as the determination of election cases and impeachment charges. It had not upheld such powers so far as they related to the law-making function nor the informative function, but many state courts had upheld the power so far as it related to the law-making function,¹⁵ and it had been upheld so far as concerned the informative function by one lower federal court and Supreme Court *dicta*;¹⁶ and there had been legislative practice—English, colonial, state and federal—justifying the use of the contempt powers for all the legislative functions named.¹⁷

In the light of all these precedents what answer should have been given between 1924 and 1926 to the question with which this Comment started? It would seem as though an affirmative answer should have been given to every part of the question. But many important men in the United States, who found it to

¹⁴ (1917) 243 U. S. 521.

¹⁵ Note 10 *supra*.

¹⁶ *Ex parte Caldwell* (1905), 138 Fed. 487; *In re Chapman*, 166 U. S. 661, 794.

¹⁷ Notes 1-7 *supra*.

their own interest to think otherwise, maintained that Congress had no such powers, and by their refusal to testify before investigating committees gave us the spectacle of a few men having more power to conceal than the entire government had to discover. In particular in 1924 the proceedings of the Committee of the Senate appointed to investigate the management of the Department of Justice were brought to a standstill by the refusal of Mally S. Daugherty, the brother of the attorney general, to appear before the Committee and to produce the books of a bank of which he was president.

Mally S. Daugherty was arrested by the sergeant-at-arms of the Senate for the purpose of compelling his attendance, but he was discharged on habeas corpus proceedings by a district judge of the United States for the Southern District of Ohio,¹⁸ on the authority of the Kilbourn case, so that the desired information was not obtained; but the case was appealed to the United States Supreme Court, and in January, 1927, in the case of *McGrain v. Daugherty*,¹⁹ the Supreme Court held that the District Court of Ohio had erred in discharging Daugherty from custody and reversed the order of such court, because it held that Congress possesses such auxiliary powers as are necessary and appropriate to make the express powers effective; that, although it does not possess any general power to inquire into private affairs and to compel disclosures, it does possess the power to exact information in aid of the legislative function with process to enforce it as an essential and appropriate auxiliary to the legislative function; that the investigation in question was for such a purpose and not for the purpose of trying the Attorney General before its bar, although the resolution directing the investigation did not expressly so say, and that the question had not become moot by the expiration of the 68th Congress because the Senate is a continuing body.

The Supreme Court based its decision upon legislative practice in the British Parliament, colonial legislatures, state legislatures, and by both houses of Congress (although it discussed only the latter); upon the decisions of the state courts cited above; and upon the four decisions of the United States Supreme Court just discussed. The decision is clearly correct both from the standpoint of authority and from the standpoint of principle, and now gives the answer of the Supreme Court to another part of our question.

The court rested its decision upon the power of legislative

¹⁸ *Ex parte Daugherty* (1924), 229 Fed. 620.

¹⁹ (1927) 47 S. Ct. 319.

bodies to punish for contempt in aid of the law making function. That is, the Senate had the power to carry on an investigation as a basis for legislation. It might also have rested its decision upon the power of the Senate to investigate the administration of one of the departments of government, and upon its power to inform the voters and public generally as to how their business is being conducted.²⁰

The power is neither a survival of the judicial power when both houses of England sat together as a highest court, nor a power conferred, but an inherent power of legislative bodies. Its basis is necessity.²¹ It is not, therefore, affected by the doctrine of separation of powers, which is a political rather than a legal doctrine, but because thereof an assembly cannot afflict punishment as punishment but only for the purpose of removing an obstruction to its proceedings. As a result of this decision Congressional investigations will doubtless begin again, and men will either testify when asked to do so, or go to jail.

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²⁰ 74 U. of Pa. L. Rev. 691-725, 780-829; 34 Yale L. J. 326; 40 Harv. 153.

²¹ *Burdett v. Abbott* (1811), 14 East. 1, 137-8; *Anderson v. Dunn* (1821), 6 Wheat. 204. *Kilbourn v. Thompson* was wrong in this respect, and to that extent should no longer be regarded as authority.